IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia, Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF OF CLARK C. HAVIGHURST, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ABE DUPLICATORS, INC.—1722 Eye Street, N.W.—Washington, D.C.—298-8627

TABLE OF CONTENTS

AUTHORITIES CITED

Statutes:

Miscellaneous:

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MAY IT PLEASE THE COURT:

The undersigned applicant, Clark C. Havighurst, respectfully moves this honorable Court for leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

1. Applicant is a professor of law at Duke University, teaching courses in antitrust law and public regulation of business as well

as seminars in legal and policy issues in health care. His scholarship in recent years has focused primarily on the health care delivery system and the role of law in improving its performance. In particular, he has closely examined in his published writings both the prospects for strengthening the competitive market as an instrument of social control of the health care system and the problems presented by the alternative of more closely regulating behavior in this important industry. See, *e.g.*, "Health Maintenance Organizations and the Market for Health Services," 35 *Law & Contemp. Prob.* 716 (1970), and "Regulating Health Facilities and Services by 'Certificate of Need,'" 59 *Virginia L. Rev.* 1143 (1973).

2. This case presents this Court with an opportunity to determine the applicability of the antitrust laws to the so-called "learned professions," an issue which has never been definitively resolved. While this case presents the issue solely within the context of the legal profession, the result has important implications for other professions as well. While there is potentially much room for debate about which particular callings would qualify for the implied antitrust "exemption" recognized by the Court of Appeals, the medical profession would seem certain to be among those directly affected.

3. Applicant believes that the parties, being primarily concerned with the role of the antitrust laws in the market for legal services, are unlikely to provide the Court with an adequate sense of the importance of this case for the medical profession and for the performance of the health services industry as a whole, an industry which now consumes U.S. resources at a rate in excess of $100 billion per year. While *amicus curiae* briefs on the grant or denial of a writ of certiorari are generally not favored

by this Court, it is respectfully submitted that this Court would be materially assisted in its appraisal of the importance of this case by submissions highlighting the role of antitrust policy in professions other than the legal profession.

4. Applicant has requested consent to file a brief *amicus curiae* from the parties to this case under Rule 42 of the Rules of the Court, but as of this date the requisite consents have not been received.

Applicant therefore respectfully urges this Court to grant leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

The undersigned, Clark C. Havighurst, respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case so that this Court may examine the implications of the decision below for the medical profession and the market for health services. The undersigned is a professor of law at Duke University, teaching antitrust law, regulated industries, and seminars on legal and policy issues in

health care. His recent research interests have largely concerned the health care delivery system and the role of law in improving its performance.

INTRODUCTION AND SUMMARY OF ARGUMENT

The majority in the Court of Appeals in this case has discovered an implied exemption from the antitrust laws which, if allowed to stand, would have grave implications for the health care delivery system. *Goldfarb v. Virginia State Bar and Fairfax Co. Bar Ass'n,* 497 F.2d 1 (4th Cir. 1974), reversing 355 F. Supp. 491 (1973). This brief argues (1) that the asserted "learned professions" exemption is without legal foundation and, moreover, would be inconsistent with basic antitrust policy in numerous respects; (2) that there is ample room under an antitrust regime for those professional activities which serve the public well; and (3) that the market for medical services features a substantial degree of monopoly power, which is perpetuated and increased by concerted activities of the medical profession and which could be moderated by intelligent application of antitrust principles. On these grounds it is submitted that a sweeping antitrust exemption for the so-called "learned professions," such as that recognized by the majority in the Court of Appeals, would be not only bad law but bad policy as well.

The antitrust laws are potentially one of society's best defenses against elitism and monopoly in medicine. Even where Congress or state legislatures find it appropriate to abridge competition in the provision of medical services, antitrust – if unhampered by a "learned professions" exemption or by unrealistic standards for assessing interstate impact – can assist the courts in harmonizing restrictive

legislation with other values of a free society. *Cf. Silver v. New York Stock Exchange*, 373 U.S. 341, 359-60 (1963). To a substantial degree, the lack of an explicitly procompetitive legal environment has contributed to many of the problems which now afflict the health care delivery system. Explicit judicial acceptance of an antitrust exemption for the medical profession would exacerbate these problems and necessitate greater public intervention in the highly private and personal business of obtaining attention to one's health needs. By the same token, clarification that antitrust policy is relevant to the marketplace for professional services of all kinds could improve the climate for needed change.

A high priority should be attached to weakening monopoly and strengthening competition in the market for health services, a market which currently consumes U.S. resources at a rate of over $100 billion a year and which features cost increases which far outstrip inflation rates in the economy as a whole. In this case, immediately involving the legal profession, this Court is presented with an occasion for action which will significantly affect, one way or the other, the performance of this important economic sector.

ARGUMENT

I

A "LEARNED PROFESSIONS" EXEMPTION SUCH AS THAT ANNOUNCED BY THE COURT OF APPEALS MAJORITY WOULD BE INCONSISTENT WITH ANTITRUST LAW AND POLICY IN NUMEROUS RESPECTS.

A. The Asserted "Learned Professions" Exemption Is Without Legal Foundation And Would Violate The Salutary Principle That Exemptions From The Antitrust Laws Are Not To Be Lightly Implied.

Judge Craven's insightful dissenting opinion in the Court of Appeals accurately notes the absence of substantial judicial support for exempting the so-called "learned professions" from the antitrust laws. 497 F.2d at 23. The asserted exemption likewise finds no support in revealing statutory language or in legislative history. It thus appears that the majority below has overridden the strong procompetitive policy of the antitrust laws without helpful precedent to guide it and with far less statutory warrant and far less critical examination of the policy issues than has ever supported recognition of any other antitrust exemption. Its decision is therefore inconsistent with the long-standing and widely approved principles which this Court has evolved for asserting the paramountcy of competition where Congress has not spoken plainly to the contrary.

The strength and broad compass of antitrust's procompetitive policy have been amply revealed in many decisions of this Court. Thus, even where Congress has expressly

created an exemption from the antitrust laws, as it did in declaring in section 6 of the Clayton Act, 15 U.S.C. §17 (1970), that "the labor of a human being is not a commodity or article of commerce," this Court has construed the exemption narrowly. For example, this Court has resisted attempts to broaden the "human labor" exemption beyond the obvious Congressional intent to allow legitimate concerted activities of labor unions and the like. *Atlantic Cleaners & Dyers, Inc v. United States*, 286 U.S. 427, 429 (1932); *United States v. Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485, 489-90 (1950).

Similarly, where Congress has expressly attenuated competition and reduced reliance on market forces in a regulated industry, the consistent position of this Court has nevertheless been that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored . . . ." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963). Other cases also reveal this Court's view that "[i]mmunity from the antitrust laws is not lightly implied." *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962). *See also Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

With respect to the so-called "learned professions," there is no act of Congress suggesting approval of anticompetitive practices in these sectors of the economy or supplying regulatory machinery which arguably might substitute for primary reliance on an antitrust regime. Without a clear expression of Congressional intent to exempt a specific sector, this Court has generally refused to read such an intent into the antitrust statutes, even for strong policy reasons. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), this Court rejected the argu-

ment that the Sherman Act, 15 U.S.C. §1 *et seq.* (1970), adopted prior judicial decisions that insurance was not "commerce" (322 U.S. at 553-62) and resisted implying an exemption based on state regulation (*id.* at 547-49) or general policy considerations (ruinous competition) (*id.* at 561-62). Likewise, in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), this Court refused to conclude that Congress meant to exempt bank mergers from section 7 of the Clayton Act, 15 U.S.C. §18 (1970), despite much stronger evidence of contrary Congressional intent than appears in the case of the "learned professions." *Compare* 374 U.S. at 335-49 *with id.* at 373-96 (Harlan, J., dissenting).

Flood v. Kuhn, 407 U.S. 258 (1972), is perhaps the only case in which this Court might be said to have recognized an antitrust "exemption" without explicit Congressional guidance, although there was in that case strong basis for reliance on Congressional inaction. However, *Flood* presented additional circumstances which are wholly lacking here — namely a long history of exemption based on an ancient finding that interstate commerce was not involved. Thus, in the absence of a definitive prior decision that the antitrust laws do not apply to the professions, a reversal of the Court of Appeals decision on this issue would not fundamentally disrupt an established industry, jeopardize innumerable employment relationships, upset justified expectations, or otherwise unduly penalize reliance on an opposite legal interpretation. *Cf. United States v. South-Eastern Underwriters Ass'n*, 322 U.S.533 (1944). There is therefore no warrant here for hesitancy in declaring antitrust's applicability of the kind which influenced this Court in *Flood* to perpetuate the historical judicial dispensation for baseball. The instant

case is perhaps closer to the cases involving other forms of professional athletics, as to which this Court has shown no similar hesitancy in declaring antitrust's role. *See, e.g., Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (professional football).

B. Acceptance Of The Asserted "Learned Professions" Exemption Would Amount To Judicial Toleration, Without Examination, Of Overt Price-Fixing – A Practice Which Violates Policies So Firm And Fundamental In Antitrust Jurisprudence As To Be Subject To Virtually No Other Judicially Established Exception.

In addition to narrowly construing Congressional enactments seemingly subversive of antitrust policies, this Court has largely foresworn its own and lower federal courts' right to carve out exceptions to the antitrust laws' procompetitive policy. Thus, one of this Court's great jurisprudential achievements has been its firmness in resisting persistent and repeated temptations to water down the firm prohibition against price-fixing in all of its many manifestations. Aside from the Depression case of *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), this Court has hewed close to the principle that producer groups are not to tamper with, "the central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59 (1940), and has rejected claims for exceptional treatment of price-fixing schemes on the basis of alleged special circumstances, good intentions, ineffectiveness, and so forth, thus laying a cornerstone essential to the preservation of an economy based on free enterprise and competition. *See, e.g., Citizen*

Publishing Co. v. United States, 394 U.S. 131 (1969); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). As this Court stated in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 489 (1950), "It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end."

In order to avoid having to overcome an extremely heavy, if not insurmountable, burden of establishing that the legal profession is somehow a special case when it comes to fixing prices, respondents in this case have sought to frame the issue as one of professional "exemption" rather than price-fixing "exception." The majority of the Court of Appeals was trapped by this tactic into sacrificing the strong policy against price-fixing without significant judicial inquiry into the public benefits, if any, to be thereby achieved.

A decision that the antitrust laws apply to the professions as they do to all other service industries would not inevitably result in the condemnation of the minimum fee schedules challenged in this case, although it would carry with it a substantial likelihood of that result. *Per se* rules in antitrust are to some extent rules of *stare decisis*, and relevant factual distinctions are not to be ignored. Of course, the strength of the antitrust laws' procompetitive policy dictates that few factual differences will be seen as legally relevant distinctions, and this "hard-line" policy is amply supported by the need to economize on judicial time and energy, to deter efforts to camouflage antisocial behavior, and to forge a legal rule clear enough for enforcement in criminal proceedings. Nevertheless, respondents in this case would be free to argue that the minimum fee schedules constituted valid ancillary restraints

of trade, necessary and reasonably tailored to maintain a reasonable standard of professional services. *Cf. United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, 178 (S.D.N.Y. 1960); *United States v. Morgan*, 118 F.Supp. 621, 689-691 (S.D.N.Y. 1953). Although this defense might easily fail, if, for example, less restrictive means of assuring adequate services to the public were available, it is important to note that the antitrust laws, even in an area where *per se* rules prevail, permit the courts to attend to the true issues.

C. The Asserted "Learned Professions" Exemption Would Sweep Broadly And Indiscriminately, Encompassing An Uncertain Number Of Other Professions And Legitimizing A Wide Range Of Anticompetitive Practices, Some Of Which Might Be Even More Detrimental To The Public Than The Fee Schedules Involved In This Case.

The Court of Appeals majority has provided a sweeping dispensation for restraints occurring within the legal profession which it had no occasion or opportunity to examine. The "learned professions" exemption which it announced would also provide immunity for an uncertain, but probably large, number of anticompetitive activities of other professions.

It is, of course, disturbingly unclear which of the innumerable licensed occupations would qualify for the exemption recognized by the majority below. This circumstance alone — pregnant with possibilities for invidious distinctions of a shockingly elitist character — should weigh heavily against attaching weight to "learning" or "professionalism." Special antitrust treatment for the professions is particularly questionable at a time in the nation's history when lawyers

and doctors, the two professional groups most obviously benefited, are seen as, at best, no more than human in their pursuit of such worldly things as power and money.

Recognition of an antitrust exemption for the legal profession, if it should subsequently appear that other professions were not entitled to similar immunity, could eventually embroil the federal courts in inconsistencies similar to those reflected in this Court's treatment of professional athletics under the antitrust laws. Early recognition of baseball's "exemption," *Federal Baseball Club v. Nat'l League*, 259 U.S. 200 (1922), coupled with this Court's reluctance thereafter to change the rules of "the national pastime," *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972), was not carried over to other sports, *e.g., Radovich v. NFL*, 352 U.S. 445 (1957). The reasoning necessary to preserve baseball's special status without conferring immunity on other forms of professional athletics was most unsatisfying, even to the Justices comprising the majority in the *Flood* case. 407 U.S. at 282. It should be clear to this Court that similar rationalizing in defense of a similarly privileged status for the legal profession would be most unseemly and indeed might lead the general public to view the Court not merely as an overly tolerant observer but as an active participant in the lawyers' conspiracies it tolerates. Even if the exemption is ultimately not confined to lawyers alone, it underscores current widespread concern about elitism, special privilege, and double standards of justice in American life.

The Court of Appeals had before it no information regarding any profession other than the legal profession. Yet its decision, if allowed to stand, could reverberate through a large portion of the economy, establishing a dispensation

for many activities which the Court of Appeals could not have contemplated. Part III of this brief illustrates some of the possible implications for the health care delivery system of a "learned professions" exemption. That discussion should help to reveal the hazards of implying an antitrust exemption which sweeps broadly and indiscriminately whe, as discussed in Part II of this brief, antitrust principles can be sensitively applied so as to further the public's interest in efficient performance of the various markets for professional services without sacrifice of essential values.

II

THERE IS AMPLE ROOM UNDER AN ANTITRUST REGIME FOR THOSE PROFESSIONAL ACTIVITIES WHICH SERVE THE PUBLIC WELL

As already observed in Part I(B) of this brief, the capacity of the antitrust laws to deal sensitively with relevant special circumstances which may be discovered in particular professions makes it unnecessary for this Court to recognize the occasional existence of such circumstances by creating an exempt sector of the economy. The following widely quoted language of this Court in *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952), on which the Court of Appeals majority in part relied, should be read to mean no more than that the antitrust laws are to be applied with circumspection in sensitive areas:

> We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This

> Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. [citation omitted]

The teaching of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), is that recognized self-regulatory responsibilities and antitrust concerns can and should be reconciled to curtail the potential for abuse. Similarly, in *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961), this Court objected to the use of boycotts to enforce product safety standards but left the door open to industry-initiated standards which were given effect in less dangerous ways. It remains open to this Court to develop standards for appraising professional self-regulatory activity in light of anticompetitive hazards.

Just as this Court could employ its experience in reconciling antitrust policies with legitimate self-regulatory activities in this case, its application of the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), should likewise give appropriate scope to antitrust policy. This would mean rigorous insistence on preserving competition wherever Congress has not indicated an intent to defer to state policy — as it had done in *Parker v. Brown*, *id.* at 354-58, and has done even more explicitly with respect to the insurance industry in the Mc Carran-Ferguson Act, 15 U.S.C. § 1012 (1970). This Court's policy of adopting narrow constructions of federal legislation which conflicts with antitrust policy should be matched by an even greater unwillingness to sacrifice Congressional policy in the absence of both a clear state policy and other controls adequately substituting for an antitrust regime. Broad, uncontrolled delegations to professional groups, of the kind blessed by the majority below in exempting the state bar under *Parker v. Brown*, should be closely

circumscribed by antitrust protections, and there should be no hesitancy in invoking federal preemption where the state has sacrificed competition without federal warrant or a substitute which could reasonably be expected to serve the federal purpose. It would be surprising if the express exemption for insurance, "to the extent that such business is . . . regulated by state law," 15 U.S.C. § 1012, were not more extensive than the implied exemptions created for other industries under state legislation and *Parker v. Brown.*

In general, it appears that antitrust policy could effectively guide professional activities without sacrifice of essential values and with profit to the public in the elimination of anti-competitive practices. Indeed, the higher purposes of professionalism can be better fostered within an antitrust framework than outside of it. As District Judge Bryan observed in this case, minimum fees are "the least learned part of the profession," 355 F.Supp. at 495. There should be no doubt about judicial competence to look behind a "profession's professions" to economic reality.

III

THE MARKET FOR MEDICAL SERVICES HAS IMPORTANT MONOPOLISTIC FEATURES. BECAUSE THE CONCERTED ACTIVITIES OF THE MEDICAL PROFESSION HAVE CONTRIBUTED TO THE PRESERVATION AND EXTENSION OF MONOPOLY POWER, APPLICATION OF THE ANTITRUST LAWS TO SUCH PROFESSIONAL ACTIVITIES WOULD HAVE IMPORTANT PUBLIC BENEFITS.

Each physician possesses a substantial degree of monopoly power over his individual patients. This monopoly power is not unlawful under the Sherman Act, since it

results from natural conditions of the medical marketplace, such as the patient's ignorance of the technical aspects of medicine, his difficulty in "shopping" for alternative providers or treatments, and his reluctance to economize where his or a family member's health is concerned — particularly where private insurance or a public program pays all or a portion of the cost. Market power of this kind opens opportunities for exploitation, and the public clearly relies significantly on the physician's personal ethics and on the profession's own internal controls to protect against such abuses as overcharges, redundant x-rays and lab tests, and unnecessary surgery or office visits. Society's decision to restrict entry into the business of providing medical services and to delegate control of the supply of physicians in some measure to the medical profession has, of course, increased practitioners' market power by removing possible "close substitutes" for many of the physician's services. *Cf. United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

If professionalism has any meaning, it must refer to the existence of conditions necessitating the consumer's delegation of important decision-making power to the provider of services. Thus, what arguably distinguishes a profession from other businesses is the very set of factors which produces a high degree of market power, and the argument for a "learned professions" exemption appears to suggest that the more monoply power possessed by the members of a particular profession, the weaker is the case for applying the antitrust laws to it. Anomalous though such a doctrine would seem to be, it reveals the true line which the policy argument must take — namely, that natural market conditions so limit the opportunity for, or the desirability of, relying on consumer choice and competition that these controls should be scrapped entirely.

This argument is based on two assumptions; first, that antitrust principles, competition, and the operation of the market can have no benefit at all (or, alternatively, will generate harms exceeding the benefits). And, second, that the professions themselves can be relied upon to supply adequate alternative mechanisms of social control. As argued in Part I of this brief, these arguments are better addressed to Congress, which can evaluate the underlying assumptions, than to the courts, which have correctly established antitrust as a fundamental policy which Congress and, to a lesser extent, the state legislatures alone can set aside. Moreover, as suggested in Part II of this brief, these arguments for blanket immunity underestimate the ability of antitrust principles to take relevant special circumstances into account.

The specific argument in this Part III is that, in the absence of vigorous application of the antitrust laws, the concerted activities of the medical profession have increased practitioners' monopoly power and have curtailed market developments which would have reduced it. It is submitted, on the strength of this showing, that the antitrust laws could be appropriately applied to the activities of professional associations and that the potentiality of public benefit from enforcement in these areas has yet to be fully realized.

Medical societies, it is true, behave somewhat differently than do classical cartels, seldom engaging in overt price-fixing. Yet their capacity for harm is no less on that account. Because their members already possess market power in their own right arising from the nature of their services, it is unnecessary for medical societies to forge additional monopoly power by anticompetitive agreements. Instead, they need only to preserve those market conditions which guarantee their members' market power.

Some parallels to ordinary cartel behavior may of course be noted. Although medical societies have not fixed minimum fees as did the county bar association in this case, fee schedules promulgated under society-sponsored Blue Shield plans may have had the effect of standardizing fees for patients not covered by Blue Shield policies. Similarly, some medical societies have promulgated "relative value" scales, which suggest multipliers by which physicians may relate their charges for each particular service to every other, a practice which fosters greater pricing uniformity than could otherwise prevail. The medical societies have also engaged in a kind of market division — another typical cartel practice — by enforcement of practitioners' ethical undertakings against advertising and by discouraging criticism of competitors thus, in effect recognizing each doctor's "sphere of influence" over his particular patients. A further parallel to other cartels appears in the medical societies' historic commitment to preservation of a pricing system ("fee-for-service") which facilitates discriminatory pricing and thus allows the physician-monopolists to maximize their returns without reducing the quantity of services supplied. *See, e.g.*, Kessel, "Price Discrimination in Medicine," 1 *J. Law & Econ.* 20 (1958). For examples of other cartels' commitments to discriminatory pricing systems, *see FTC v. Cement Institute*, 333 U.S. 683 (1948) ("basing-point" pricing); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) ("runs and clearances"); Securities Exchange Act Release No. 8239 (1968) (repression of cost-justified quantity discounts and "give-ups" on brokerage services).

The power of a coalition of lawful monopolies, such as those possessed by individual medical practitioners, may be greater than the sum of its parts, giving rise to antitrust

concerns. *Cf. United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Thus, a medical society can preserve and strengthen the monopoly power of each physician-monopolist in the following ways:

> — *by enforcing mutual recognition of "spheres of influence," stifling competitive impulses, and generally fostering an "ethic" which causes the more conscientious providers to avoid commercialism,* thus guaranteeing fulfillment of the prophecy that commercialized practice attracts the less "ethical" members of the profession. The use of "business honor and social penalties" to reduce competition was a major factor in *American Column & Lumber Co. v. United States*, 257 U.S. 377, 411 (1921). *Compare* Kessel, 1 *J. Law & Econ.* at 45-46 (1958).
>
> — *by collective maintenance of the conditions giving rise to practitioners' market power, particularly consumer ignorance.* The ban on advertising, even of relevant credentials, American Medical Ass'n, Principles of Medical Ethics §5 (1971), suggests the professions' unwillingness to acknowledge that significant quality differences exist among practitioners. *Compare FTC v. Cement Institute*, 333 U.S. 683, 715 (1948), noting that the trade association, "in the interest of eliminating competition, suppressed information as to the variations in quality that sometimes exist in different cements."
>
> — *by collective maintenance of conditions hampering consumers' ability to combine for increased bargaining effectiveness* through such mechanisms

as those referred to by this Court as "contract practice" in *United States v. Oregon State Medical Society*, 343 U.S. 326, 328 (1952). Although this Court had outlawed egregiously anticompetitive behavior toward certain alternative health care plans, *United States v. American Medical Ass'n.*, 317 U.S. 519 (1943), the tactics of the Oregon State Medical Society were upheld even though the effect of the Society-sponsored insurance plan was to stifle cost-control efforts by health insurers and other types of plans which might have benefitted consumers by policing unnecessary services or excessive charges. Although facts permitting a final judgment do not appear in the record of the case, this result was probably achieved by a kind of "disciplinary" pricing (below-cost, with losses underwritten by the Society), which established the Society's Blue Shield-type plan as the industry leader and model of insurer conduct.

— *by collective cooptation of new forms of health care delivery and financing* which, if independently marketed, would make available to the public a competing "close substitute" for fee-for-service medicine. If "cross-elasticity of demand" is high, the availability of such a substitute would greatly weaken the monopoly power possessed by fee-for-service practitioners. *Compare United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956). On methods employed by medical societies to control new forms of financing

and delivery and to dominate independent plans, see *United States v. AMA*, 317 U.S. 519 (1943); *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Group Health Cooperative v. King County Medical Society*, 39 Wash.2d 586, 237 P.2d 737 (1951); Havighurst, "Health Maintenance Organizations and the Market for Health Services," 35 *Law and Contemp. Prob.* 716, 759-77 (1970) (discussing, among other things, the so-called "foundations for medical care").

— *by using the self-regulatory powers granted by Congress to penalize or handicap innovative, competitive providers*, such as health maintenance organizations. Considerable opportunities for such abuse are provided for Professional Standards Review Organizations created under the Social Security Amendments of 1972, 42 U.S.C. §1320c *et seq.* (Supp. II, 1972). *Compare Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

— *by influencing legislation and state and federal agencies' regulatory performance.* It is possible to question the extent to which the principles of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), would shelter professional domination of state regulatory agencies of the sort recently alleged to exist in the State of Texas in recent Congressional hearings. *See* Hearings on Competition in the Health Care Industry, Subcomm. on

Antitrust and Monopoly, U.S. Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (May 14-15, 1974).

In the light of the foregoing activities designed to maintain consumer ignorance and dependence and the dominance of fee-for-service medicine, it is possible to suspect disingenuousness in the medical profession's reverence for the "doctor-patient relationship," in the name of which many restraints have been imposed. Indeed, it may seem to spring not so much from ethical impulses as from the natural desire of a monopolist to protect his "relationship" with the consumers he exploits. Although the sacred aspect of the doctor-patient relationship should of course be highly valued, doctors have been much criticized for making it too one-sided, not only as a matter of economics but also in human terms. *Cf.* the issue of "informed consent" as elaborated in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), and *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1 (1972).

The foregoing brief survey of the medical profession's activities suggests not only the presence of anticompetitive behavior by the medical profession but also many of the ways in which the antitrust laws could either rectify abuses or at least provide a check on excesses which might occur under color of professionalism or of state or federal legislation. Although the decision of the Court of Appeals majority seemingly excludes many of the medical profession's concerted activities from scrutiny under the antitrust laws, some anticompetitive practices of medical societies would apparently remain subject to antitrust attack. In recognition of this Court's use of antitrust laws in the *AMA* case to curb particularly flagrant restraints practiced against a consumer-sponsored

prepaid group medical plan, the Court of Appeals indicated that, while restrictions imposed by professionals on fellow professionals are exempt, restrictions imposed upon outsiders, such as insurers, would not be; thus, a doctors' conspiracy "to obstruct the interstate sale of health insurance" was said in dicta not to be exempt. 497 F.2d at 15.

The majority below would thus apparently apply the antitrust laws where the brunt of the restraint is borne by someone or some entity other than an individual professional but not where consumers are directly victimized, as they are by lawyers' minimum fee schedules or by the repression of useful information. It would seem appropriate for this Court to remind the majority below that it is consumers whose interests are at stake in antitrust policy and that it is through protection of competition, not merely through vindication of competitors, such as Group Health in the *AMA* case, that consumer protection is ultimately achieved. *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). To limit the role of the antitrust laws to policing only those restraints practiced against "close substitutes" for traditional fee-for-service medicine is to endorse, without warrant, continued monopolization of the latter.

In its attempt to support an exemption for intraprofessional restraints, the Court of Appeals majority failed to examine the *AMA* case with care. Although this Court declined in that case to consider whether the antitrust protection is accorded to Group Health should extend beyond alternative financing and delivery mechanisms, its decision suggests no desire to shield anticompetitive activities of professionals. Moreover, like any doctor or medical group practice, organizations like Group Health are in the business of providing professional services for money. Further, the restraints in the *AMA* case were in fact imposed by professionals not on Group Health itself but on

other professionals, those employed by Group Health. Finally, ethical concerns are at least as important in organizations like Group Health as in traditional medical practice arrangements, and, indeed, the restraints in the *AMA* case were imposed in the name of professional values. Yet this Court found no reason to bow before professionalism. The attempt of the majority below to confine the *AMA* case is thus a failure since no meaningful line can be drawn. There is no basis for declaring illegal only some of the medical societies' tactics for maintaining and enhancing their members' market power.

CONCLUSION

The petition for a writ of certiorari should be granted, so that this Court may consider, among other things, the implications of the decision below for the medical profession.

Respectfully submitted,

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September 23, 1974

AFFIDAVIT OF SERVICE

The undersigned, not a member of the bar of the Supreme Court of the United States, hereby certifies that service of the attached Motion for Leave to File and Brief *Amicus Curiae* was made upon all parties required to be served, in accordance with Rule 33(1) of the Supreme Court. Three copies of the Motion and Brief were mailed, first class postage prepaid, certified mail, return receipt requested, from The Main Post Office, Washington, D.C., on September , 1974, to each of the following parties:

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IN WITNESS WHEREOF,

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